IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13-04-2005

CORAM :

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

Second Appeal No. 503 of 1994
-o-

Ashrapunnissa @ Hasarathunnissa .. Appellant/Plaintiff
by Power Agent S. Gulam Hussain
Madras.

Versus

1. Ayisha Muthu
2. T.M. Habeeb Rahaman
3. T.M. Kudbudeen
4. T.M. Fadhrunnissa
5. T.M. Meharunnissa .. Respondents/Defendants

Appeal under Section 100 CPC against the Judgment and Decree dated 27-09-1993 made in A.S. No. 60 of 1993 on the file of the Third Additional Subordinate Judge, Coimbatore confirming the decree and judgment dated 25-02-1992 made in O.S. No. 1684 of 1986 on the file of the Third Additional District Munsif Court, Coimbatore.

For Appellant : Mr. A. Anbarasu
for Mr. T.R. Rajaraman
For Respondents : Mr. R. Munusamy

JUDGMENT

The Plaintiff, who lost her case before the courts below, has come forward with this second appeal.

2. For the sake of convenience, the parties shall hereinafter be referred to as per their rank before the trial court.

3. The Plaintiff has filed the suit for declaration, possession and for a consequential injunction. According to the plaintiff, the suit property is common space measuring 8 feet North to South and 26 feet East to West marked as ABCD; bathroom EMNF; Store room MNCO; latrine EFDG; and the door ways P & Q in the plan filed with the plaint, in Door Nos. 157, 165 and 167, Devendra Street, Coimbatore. The suit property and other properties were originally owned and possessed by one Mahaboob Unnissa Bibi, W/o. Mohammed Dawood. On 17-10-1966, under Ex.A-3, the said Mahaboob Unnissa Bibi sold southern portion of the property at Door No. 16/157, 165 and 167 together with vacant portion measuring 8 feet North to South and 26 feet East to West

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with liberty to the residents to use the two latrines in the vacant space and to reach the Devendra street on the East in common to the Defendants predecessor in title namely T.M. Mohammed Haneefa. On the same day i.e., 17-10-1966, the said Mahaboob Unnissa Bibi executed a deed of settlement in favour of the plaintiff in respect of the Northern portion of the Door No.16/157, 165 & 167 and also the common right in the Southern vacant space measuring 8 feet North to South and 26 feet East to West and in two flush out latrines in the vacant space and the common right in the western 3 feet land; that the plaintiff and T.M. Mohammed Haneefa became entitled to common rights in the Southern open space 8 feet X 26 feet together with two common latrines and 3 feet on the Western side for the use of the open space and the passage leading to Devendra Street on the Eastern side. According to the plaintiff, she is residing in Port blair since 1979 and therefore she had given a power of attorney to the said T.M. Mohammed Haneefa on 30-09-1982 for management of her properties which was subsequently revoked. Thereafter, on 04-11-1983, the plaintiff appointed and retained Mr. S. Gulam Hussain, elder brother of her husband as her power of attorney. During November 1983, the said Mohammed Haneefa had put up constructions in the common passage namely bath room, store room and also installed two doors in the portions marked ABCD in the sketch attached with the plaint thereby prevented the common access to the plaintiff and her tenants to go to the latrine and the common passage leading to Devendra Street. On 19-12-1983, Ex.P5, the plaintiff issued a legal notice to the said T.M. Mohammed Haneefa and called upon him to remove the unlawful construction put up by him and on 04-01-1984, Ex.A6, a reply was sent by the said T.M. Mohammed Haneefa containing frivolous allegations. On 20-12-1984, the said Mohammed Haneefa died, hence the suit was filed against the defendants herein, who are wife and children of the said Mohammed Haneefa.

4. The third defendant has filed his written statement for and on behalf of the other defendants contending that there is no recital in the settlement deed dated 17-10-1966 executed by Mahaboob Unnissa Bibi in favour of the plaintiff to use and enjoy the suit property in common. The plaintiff has constructed a house in the common space on the Northern side of her property ad-measuring 9 feet 5 inches X 26 feet leaving a small lane to reach Devendra Street. The plaintiff has no right over the suit schedule described property which is in possession of the defendants from 1966. There are two toilets and the one on the eastern side is being used by the defendants and the western side toilet is used by the plaintiff and her tenants for the past 20 years.

5. Before the trial court, the plaintiff has marked Exs. A1 to A-11 and examined one Gulam Hussain and Ahmed as PWs 1 and 2. The defendants have marked Exs. B1 to B25 and the second defendant was examined as DW1 and one P.M. Ibrahim as DW2. An advocate commissioner was appointed whose report and sketch were marked as Exs. C1 and C2 respectively.

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6. The trial court framed two issues namely (i) whether the plaintiff is entitled to the relief of declaration and (ii) what other relief the plaintiff is entitled to.

7. The trial court on consideration of oral and documentary evidence let in before it has found that the plaintiff has not disputed the fact that after execution of the deed of settlement in her favour, she had constructed three houses which are in occupation of the tenants and there is a lane leading to Devendra Street which is being used by the plaintiff and her tenants. The trial court relied on the evidence of DW1 and found that there was an oral arrangement to the effect that the defendants shall use the toilet on the eastern side and accordingly they are using the same for the past many years and also constructed bath room and store room, which is evident from Exs. B7 and B8 relating to the period 1971, but the same was never objected to by the plaintiff and having allowed the defendants to construct the store room and bath room and also use the toilet situate on the Eastern side, in the absence of recitals in the settlement deed to the effect that the suit property can be used in common by the plaintiff and the defendants, the relief of declaration cannot be granted and dismissed the suit with costs.

8. Aggrieved by the decree and judgment of the trial court, the plaintiff has preferred A.S. No. 60 of 1993 and after careful consideration of the oral and documentary evidence, the lower appellate Court accepting the findings of the trial court dismissed the appeal.

9. The defendants/respondents herein have filed Cross Appeal before the lower appellate Court as against the findings of the trial court that the building in the suit property was constructed in the year 1983; whereas, according to the defendants, the said building was constructed in the year 1966 and they are in possession and enjoyment of the same for the past 20 years and therefore prayed that the said finding of the trial court be set aside. The lower appellate after careful consideration of the evidence dismissed the cross appeal filed by the defendants along with the appeal preferred by the plaintiff.

10. The learned counsel appearing for the Plaintiff/ appellant in this second appeal relied on Exs.A3, settlement deed dated 17-10-1966 executed by Mahaboob Unnissa Bibi in favour of the plaintiff and Ex.A4, sale deed 17-10-1966 executed by Mahaboob Unnisaa Bibi in favour of the defendants father. According to the learned counsel for the appellant, in view of the specific recitals contained in Exs. A3 and A4, the appellant is entitled to the relief prayed for in the suit; that the lower appellate court erred in holding that the right to access to Devendra Street, as specified in Ex.A3 would not refer to the suit property; that the plaintiff's claim cannot be rejected on the ground that there is an alternative way since the plaintiff's relief is based on Exs. A3 and A4; that the lower appellate Court, having found that the Store room and bathroom have been constructed recently, it failed

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to see that the same was constructed to forestall the plaintiff from exercising her right over the property and prayed for setting aside the decree and judgment passed by the courts below.

11. Per contra, the learned counsel appearing for the defendants/respondents herein submits that Mahaboob Unnisa Bibi sold part of the property on the southern side to T.M. Mohammed Haneefa, husband of the first defendant and the remaining portion on the Southern side was settled to the plaintiff, however, retained her right to use the latrine located in the south west corner in common; that there is a lane in the Northern side of the property leading to Devendra Street which was used all along by the plaintiff and her tenants; that in the lane in the Southern side to an extent of 8 X 26 feet the plaintiff has no right as the defendants have been in possession of the same ever since 1966; that the plaintiff is entitled to use the lane of 3 feet width; that though the plaintiff and her tenants were using the latrine in the south west corner for the past 20 years, the other latrine adjacent to it has been in possession and use of the defendants as per the oral agreement, however, the lane in the southern side leading to gangway and ultimately to Devendra Street was in exclusive use of the defendants and prayed for dismissal of the second appeal.

12. The courts below, while analysing the recitals of Ex.A4 found that the plaintiff is entitled to use the vacant passage located on the Northern side and not on the Southern side. It is further held by the courts below that in Ex.C2, sketch, the advocate commissioner has clearly mentioned that it is easy for the plaintiff and her tenants to reach Devendra Street by using the lane on the Northern side. The courts below relied on the evidence DW2, who has stated that the latrine in the Eastern side has been exclusively used by the defendants and the one in the Western side was in use of the plaintiff and her tenants and a wall was also raised near the toilet which was in use by the defendants and a door was also installed by them and held that the said arrangements were made for the convenient use of the Southern side passage by the defendants. It is further pointed out by the lower Appellate Court that to dispute the evidence of DW2, the plaintiff has not come into the box. While rejecting the case of the defendants that the construction was made as early as 1966, the courts below categorically found that the same could have been made during 1983. It is also to be noted that the defendants have not produced any valid evidence to show that the construction in dispute was made in the year 1966. Indeed, in Exs. B7 and B8 expenses alleged to have been made in the year 1971 was not reliable because corrections were found therein. Considering the above facts, the courts below have rightly come to the conclusion that the declaration and injunction sought for by the plaintiff cannot be granted.

13. The Court has a discretion to grant declaration depending upon the facts of each case, as has been held by the Honourable Supreme Court in the decision reported in (M/s. Supreme

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General Films Exchange Ltd., vs. His Holiness Maharaja Sri Brijnath Singhji Deo of Mainar and others) AIR 1975 SC 1810.

14. It is not a matter of absolute right for the plaintiff to obtain a declaratory relief. It is discretionary of the Court and in every case, the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstance of the case to grant a declaratory decree prayed for. Such relief has to be granted by the Court according to sound and recent principles and ex difito auntitiae. Followed (Executive Committee of Vaish Degree College, Shamli and others vs. Lakshmi Narain and others) AIR 1976 SC 888.

15. The plaintiff must be a person entitled to any legal character or to any right as to any property; the defendant must be a person denying or interested to deny, the plaintiff's title to such character or right; the declaration sued for must be a declaration that the plaintiff is entitled to a legal character or to a right to property; and where the plaintiff is able to seek further relief, then a mere declaration of title he must seek such relief. If any of the first three conditions are not fulfilled, the suit should be dismissed. If those conditions are fulfilled but the fourth is not, the court shall not make the declaration sued for.

16. The appellate Court will not interfere unless the discretion of grant of declaratory relief or refusal to grant such declaratory relief has been exercised arbitrarily or wrongly. The grant of a declaratory relief or refusal to grant a declaratory relief is discretionary but the exercise of the discretion is primarily the business of the trial court and it is not proper in Second appeal to interfere with such exercise of discretion on the part of the courts below unless the judgment under the appeal is perverse or is based upon evidence admittedly illegal or the findings is without evidence or there has been a wrong construction of documents or misreading of evidence.

17. Applying the above said principles to the facts in this case, the plaintiff and her tenants have access to reach Devendra Street through Northern side common passage and also reach the toilet located in South Eastern side by using the common passage on the Western side. The construction made by the defendants in the common passage on the Southern side though declared not put up in the year 1966 as claimed by the defendants, it is declared by the courts below that the defendants were in exclusive use of the said common passage. Besides that, even the plaintiff, in her notice Ex.A5 dated 19-12-1983 has not mentioned the year when the construction was made by the defendants. Consolidating all the above said facts, this Court, while dealing with second appeal find no reason to interfere with the denial of declaration on the part of the courts below.

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18. This court is of the view that the findings of the courts below are made based on oral and documentary evidence.

There is no question of law, much less substantial question of law involved in this second appeal. Hence, the second appeal fails, liable to be dismissed and accordingly the same is dismissed. No costs.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Third Additional Subordinate Judge
   Coimbatore

2. The Third Additional District Munsif
   Coimbatore

3. The Section Officer
   V.R. Section
   High Court, Madras

Pre-delivery Judgment in
S.A. No. 503 of 1994

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